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PHILIPPINE INDEPENDENCE

BRIEF PREPARED BY DANIEL R. WILLIAMS, RELATIVE TO THE CONSTITUTIONAL POWER OF CONGRESS TO ALIENATE SOVEREIGNTY OVER THE PHILIPPINE ISLANDS

PRESENTED BY MR. BINGHAM

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IS CONGRESS EMPOWERED TO ALIENATE SOVEREIGNTY OF THE UNITED STATES?

(Supplemental Brief)

By DANIEL R. WILLIAMS

On January 10, 1930, Senator King, of Utah, requested the legislative counsel of the Senate to supply him "legal material" bearing upon the constitutional power of Congress to grant Philippine independence. On January 13, 1930, or three days later, a memorandum on the subject was submitted him by an assistant counsel of that office. While this memorandum makes no express holding upon the question suggested, it quotes in extenso from Willoughby's Constitution of the United States, and Malcom's Philippine Constitutional Law, both of which authors are of opinion that Congress is now empowered to alienate United States sovereignty over the Philippine Islands.

Messrs. Willoughby and Malcolm discuss the particular question at length in their respective treatises, and it is fair to assume state the case in favor of congressional authority in the premises as strongly as it can be done. For this reason their admissions upon certain controverted points may be accepted as authoritative, thus reducing the issue to comparatively narrow limits.

SOVEREIGNTY HAS NEVER BEEN TRANSFERRED OR WITHDRAWN OVER ANY TERRITORY ADMITTEDLY BELONGING TO THE UNITED STATES

Willoughby, Volume I, section 317, states:

In several treaties in settlement of boundary disputes areas previously claimed by the United States as its own have been surrendered to foreign powers. These, however, can scarcely be considered as instances of the alienation or portions of its own territory, for the fact that the treaties were assented to by the United States is in itself evidence that it conceded that the claim that the areas in question belonged to the United States was unfounded. There has been no instance in which territory, indisputably belonging to the United States, has been alienated to another power.

Malcolm, page 169, states:

No precedent can be pointed to in which the United States alienated territory indisputably its own to another country. The most that has been done has been to make certain adjustments of boundaries and to remove any cloud to the title of the United States to the region in question.

NO AUTHORITY CONFERRED UPON CONGRESS BY THE CONSTITUTION TO ALIENATE SOVEREIGNTY

Willoughby, Volume I, page 422, states:

That Congress has not been expressly given the power to alienate territory which has come or been brought under American sovereignty is equally certain: Certain also is it that there has been no judicial pronouncement that Congress has this constitutional power, for there has been no exercise by Congress of such a power, and, therefore, no opportunity for its judicial examination.

Malcolm, page 169, states:

It is true that there is no express provision of the Constitution authorizing a transfer of territory in possession of the United States to another power.

THAT THE PHILIPPINE ISLANDS HAVE NOT BEEN "INCORPORATED" INTO THE UNITED STATES HAS NO BEARING UPON THE CONSTITUTIONAL QUESTION INVOLVED

Willoughby, Volume I, page 422, states:

The fact that the Philippine Islands have not been, by Congress, "incorporated" into the United States is without constitutional significance, for it is incontestible that, by the treaty with Spain, they were brought under the sovereignty of the United States.

This simply recognizes that the point at issue is whether Congress can alienate sovereignty over territory, and not whether it may elect to incorporate the inhabitants of such territory into our body politic. Nothing remains to be done or can be done by Congress—by way of "incorporation" or otherwise—to more fully vest sovereignty over the Philippine archipelago in the United States than now exists. Construing the force and effect of the Treaty with Spain in this regard, our Supreme Court, speaking through Chief Justice Fuller in the Diamond Rings case (183 U. S. 176, 180) stated:

By the third article of the treaty Spain ceded to the United States "the archipelago known as the Philippine Islands." * * * The Philippines thereby came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established. * * * The Philippines were not simply occupied but acquired, and having been granted and delivered to the United States by their former master, were no longer under the sovereignty of any foreign nation. * * * Spain granted the islands to the United States, and the grantee in accepting them took nothing less than the whole grant.

The conclusion of Doctor Willoughby, therefore, that this matter of "incorporation"—whatever it signifies—has no bearing upon and adds nothing to the Constitutional power of Congress to alienate sovereignty over the Philippines, is in accordance with law and unavoidable.

PHILIPPINE INDEPENDENCE CAN NOT BE GRANTED UNDER THE TREATY-MAKING POWER

Willoughby, Volume I, page 424, says:

That, through the exercise of the treaty-making power, American territory may be alienated is abundantly clear, as will be later shown. Of course, however, this power could not be availed of if the United States should decide to grant full independence to the Philippine Islands or to any other area, for, in such case, not until such independence became a fact would there be any other sovereignty with which the United States could deal by means of a treaty.

A treaty, in its legal sense, is "A compact between two or more independent nations with a view to the public welfare." As a

consequence, the United States could no more enter into a treaty with the Filipino people granting them independence, than it could enter into a treaty with the inhabitants of California ceding sovereignty to them over that territory. Moreover, treaties are enacted by the President and two-thirds of the Senate and not by Congress.

CONSTRUCTION OF ARTICLE IV SECTION 3 OF THE CONSTITUTION, READING:

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be construed as to prejudice any claims of the United States, or any particular State.

Claim has been made that the words "to dispose of * * * territory or other property belonging to the United States," authorizes Congress to alienate sovereignty over such territory or other property as well as proprietary rights therein.

In this connection, Malcolm, page 179, states:

The full scope of this provision has never been definitely settled. It is probable, however, that the term "territory" as here used "is merely descriptive of one kind of property, and is equivalent to the word lands." (U. S. *v.* Gratiot, 14 Peters 526, 537.) If this be true, this provision of the Constitution would have no bearing on a change of status for the Philippines, as a political entity.

Willoughby, Volume I, page 423, states:

It is the opinion of the author of this treatise that a proper interpretation of this constitutional provision would restrict its application to the proprietary rights of the United States in the property within territories subject to the jurisdiction of the United States as well as in the States of the Union.

After stating this as his personal conclusion, Doctor Willoughby proceeds:

But the fact is that the Supreme Court, as will be later shown, has repeatedly and definitely committed itself to the proposition that this grant relates to political or jurisdictional rights of the National Government as well as to proprietary rights.

Based upon this allegation, Doctor Willoughby infers that Congress might also have power, under this disposing clause, to alienate sovereignty as well as proprietary rights over territory or other property belonging to the United States. To sustain this viewpoint he refers to Chapter XXV of his treatise. An examination of such chapter—which discusses where and how Congress derives authority to govern territories—not only fails to support his supposition but expressly negatives it. We quote from such chapter as follows, page 431:

This Federal authority to govern (Territories) possessed or acquired by it has been derived from three sources: (1) The express power given to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"; (2) the implied power to govern derived from the right to acquire territory; and (3) the power implied from the fact that the States admittedly not having the power, and the power having to exist somewhere, it must rest in the Federal Government.

After referring to and discussing various Supreme Court decisions bearing upon the subject he proceeds, page 438:

The arguments and opinions of the Dred Scott case revealed the difficulties involved in a recourse to Article IV, section 3, for the power to govern acquired Territories, and, accordingly, since that date we find the Supreme Court emphasizing the doctrine that the power (to govern) is implied in the right to acquire, as well as arguable from the fact that inasmuch as the States have no authority in

the premises the Federal Government must have it. He then quotes from U. S. *v.* Kagama (118 U. S. 375), where the court said:

"The power of Congress to organize Territorial governments, and to make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making needful rules and regulations concerning the territory or other property of the United States, as from the ownership of the country in which its Territories are, and the right of exclusive sovereignty which must exist in the National Government and can be found nowhere else."

This decision, and all others cited, relate specifically to the derivation of power in Congress "to organize Territorial governments," and "to make laws for their inhabitants," and, as stated by Doctor Willoughby, the later decisions incline toward placing this power to govern upon other grounds than Article IV, section 3, of the Constitution. Certain it is that there is not a word in the decisions cited and quoted, nor in any decisions known to the writer, remotely indicating that the phrase "to dispose of * * * territory or other property belonging to the United States" contemplated conferring upon Congress power to alienate sovereignty over any such territory or property.

A full exposition of the history and construction of this Article IV, section 3, is given by David K. Watson in his monumental work on the Constitution, Volume II, beginning on page 1255. We quote from page 1270 as follows:

The word "territories" does not appear in the Constitution. Such political subdivisions did not engage the attention of its framers. What the Constitution dealt with in this clause was territory, domain, land. The "territory" or "other property belonging to the United States" is what Congress is given power "to dispose of and make all needful rules respecting."

It appears this "disposing clause" was inserted in the Constitution at the suggestion of Madison. Watson quotes in this regard from Madison's Writings, Volume III, pages 152, 153, as follows:

The terms in which this power is expressed, though of a ductile character, can not well be extended beyond the power over the territory, as property, and a power to make the provisions ready, needful, or necessary for the government of the settlers until ripe for admission as States of the Union. (Watson, Vol. II, p. 1259.)

As a result of his investigations into the genesis of this Article IV, section 3, Watson states, Volume II, page 1265:

A study of the proceedings of the convention which framed our Constitution will show that territorial forms of government were not recognized by that body. On the subject of territory this clause of the Constitution is all there is in that instrument. It is apparent from the history of the clause that the framers of the Constitution meant to confer upon Congress power over mere territory—mere domain—and that it was not referring to a Territory as that word is now understood. This view is supported by the decision of the Supreme Court in United States *v.* Gratoit (14 Peters 526, 536), where the court, in construing this clause, said: "The term 'territory,' as here used, is merely descriptive of one kind of property, and is equivalent to the word 'lands'."

In Scott *v.* Sandford (19 How. (U. S.) 393, 509), the court, speaking through Justice Campbell, said:

The Constitution permits Congress to dispose of and make needful rules and regulations respecting the territory or other property belonging to the United States. This power applies as well to territory belonging to the United States within the States as beyond them. It comprehends all of the public domain, wherever it may be.

It logically follows that if Congress, under this disposing clause, can alienate sovereignty over "United States territory" in the Philippines, i. e., "beyond the States," it can likewise alienate sovereignty

over "United States territory" within the States; i. e., in Montana, Idaho, or elsewhere.

Mr. Justice White, in Downes *v.* Bidwell (182 U. S. 244, 314), referring to the above subject, stated:

> I am not unmindful that there has been some contrariety of decision on the subject of the meaning of the clause empowering Congress to dispose of the Territories and other property of the United States, some adjudged cases treating that article as referring to property as such and others deriving from it the general grant of power to govern Territories. In view, however, of the relation of the Territories to the Government of the United States at the time of the adoption of the Constitution, and the solemn pledge then existing that they should forever "remain a part of the Confederacy of the United States of America," I can not resist the belief that the theory that the disposing clause relates as well to a relinquishment or cession of sovereignty as to a mere transfer of rights in property, is altogether erroneous.

As will be noted, "the contrariety of decision" to which the court refers, has to do solely with whether Article IV, section 3 should be limited to "disposition of property as such," or whether it also contemplated conferring upon Congress the general power "to govern territories." The decision specifically negatives the theory that such clause relates to a "relinquishment or cession of sovereignty" over territory.

Summing these admissions by Doctor Willoughby and Justice Malcolm—the leading if not the only authoritative exponents of the view that Congress can, at this time, and of its own volition, alienate United States sovereignty over the Philippine Islands—we have the following:

1. That no territory, once admittedly brought under the American flag, has ever been alienated.

2. That United States sovereignty and dominion over the Philippine Islands are completely and absolutely vested.

3. That the Constitution confers no grant of power upon Congress to alienate or relinquish sovereignty over any territory of the United States.

4. That whether the Philippine Islands—meaning the native inhabitants thereof—have been "incorporated" into our body politic or not, is without constitutional significance upon the power of Congress to grant Philippine independence; this because it is incontestible that, by treaty cession from Spain, they were brought under the sovereignty of the United States.

5. That Philippine independence can not be granted under the treaty-making power; that is, the power under which our Supreme Court has held the United States can acquire territory.

6. That the "disposing clause" of Article IV, section 3 of the Constitution relates to "territory" as property-domain—and simply authorizes Congress to sell or otherwise dispose of proprietary rights therein; or, at most, to provide a government therefor and legislate for its inhabitants.

7. That there has been no judicial pronouncement that Congress possesses this alleged power to alienate United States territory, and any claim such power exists is merely the personal opinion of those expressing it.

METHOD FOR DETERMINING WHETHER A PARTICULAR POWER IS CONFERRED BY THE CONSTITUTION

Mr. Justice Cooley, in his Commentaries on the Constitution, section 1243, lays down the following test as determinative of whether Congress is empowered to act in any specific instance:

> Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is: Whether the power be expressed in the Constitution; if it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly an incident of an express power and necessary to its execution; if it be, then it may be exercised by Congress. If not, then Congress can not exercise it.

Both Doctor Willoughby and Justice Malcolm concede the Constitution confers no express power upon Congress to alienate sovereignty, nor do they argue or pretend that such right exists as "an incident of an express power and necessary to its execution."

Inasmuch as the only jurisdiction our Supreme Court recognizes in Congress over Territories is to provide a government and make laws therefor, there would be "a straining of the timbers of the law" to hold that alienation of sovereignty is "an incident" of this power of legislation. In fact, alienation of sovereignty would not be legislation at all, as it would operate upon territory and not upon peoples, and would destroy the very thing administered by Congress for and on behalf of its principal, the American people.

It results, therefore, from the altogether legal test fixed by Mr. Justice Cooley for determining the constitutionality of any particular legislation, that Congress now lacks constitutional power to divest American sovereignty over the Philippine Islands, or over any other Territory of the United States.

POWER IN CONGRESS TO ALIENATE SOVEREIGNTY, IF IT EXISTS, MUST BE EXTRACONSTITUTIONAL

It naturally follows that if Congress can alienate United States sovereignty under existing conditions, it must be by virtue of some extraconstitutional prerogative; that is, such authority, if it applies, must find support in something outside of and beyond the grant of powers, express or implied, conferred upon such body by its written charter—the Constitution of the United States. Those claiming a present authority in Congress to alienate the Philippines are driven to this extreme as the only feasible ground upon which their contention can be sustained.

The whole field of controversy, therefore, is narrowed to the one question: Can Congress, in its discretion, legitimately arrogate this extraconstitutional power of alienating sovereignty over territory of the United States?

Given the elementary proposition that in the United States "the people are sovereign," that the Federal Government is simply "the agent and representative" of the people with limited and prescribed powers, and that all powers not so delegated are reserved to the States or to the people, it is patent that Congress can alienate territory of the United States only through transcending its creator—the Constitution. It equally follows that the burden of establishing that Congress possesses, somehow, this anomalous, alien, and altogether exceptional power, rests with those asserting such novel claim. Further, that such contention, violating as it does the basic principles

upon which our Government is founded, can not and should not be accepted unless supported in such fashion as to admit of no possible doubt or question.

What, then, is the theory upon which it is sought to import this extraneous and devastating power into our governmental system to sustain an authority in Congress which it admittedly lacks under the Constitution?

BASIS OF CLAIM THAT CONGRESS NOW HAS POWER TO ALIENATE UNITED STATES SOVEREIGNTY

Doctor Willoughby, stating his claim generally, says, page 420:

> The United States may exercise a power not enumerated in the Constitution provided it be an international power generally possessed by sovereign States.

Stated more specifically, he says, page 424:

> It seems clear to the author of this treatise that the constitutional right in question can be sustained as a right "resulting" from the fact that, viewed internationally, the United States is a sovereign power, and, except as expressly limited by the Constitution, is to be viewed as possessing within the field of international relations all those powers which, by general international usage, sovereign and independent States are conceded to possess, and that, among such conceded powers is that of parting with, as well as acquiring, political jurisdiction over territory.

He also states, page 576, that—

> The United States, through its treaty-making organ, has the constitutional power, in cases of necessity, to alienate a portion of, or the entire territory of, a State or States.

As will be noted, the above is limited to a claim of what the United States can do "in the field of international relations"; or, under the treaty-making power, "in cases of necessity."

Conceding that "the United States" is authorized to alienate American territory in certain national emergencies, this fact does not touch the issue here in controversy. Our inquiry has to do with whether Congress, which is not the treaty-making power, can, of its own motion, without the stress of necessity, and where the subject matter does not enter the field of international relations, voluntarily grant Philippine independence, i. e., alienate sovereignty over domestic territory of the United States. What "the United States" can or can not do "in the field of international relations" or under the stress of force majeure has no application to the instant case. As stated by Justice Brewer in Turner *v.* Williams (194 U. S. 279, 295):

> While undoubtedly the United States as a nation has all the powers which inhere in any nation, Congress is not authorized in all things to act for the Nation, and too little effect has been given to the Tenth Article of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The powers the people have given to the General Government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people, and can be exercised only by them, or upon further grant from them.

It becomes necessary, therefore, for those asserting this present power in Congress to alienate sovereignty over the Philippine Islands, to devise some other authority or procedure therefor than

this "resulting" power in the United States when acting "internationally" or under stress of force majeure. This further hurdle is taken by Doctor Willoughby as follows, volume I, page 576:

> Should territory be alienated to a foreign power, it would seem that it would have to be done by treaty. Should, however, the alienation be by way of granting independence to a particular territory, as, for instance, Porto Rico or the Philippines, this should be done by joint resolution. Should the people of a territory revolt against United States control, establish a de facto government, and realize in fact its independence, this independence might be recognized by a treaty. But in such case the treaty would recognize a fait accompli, rather than bring it about.

Our quest, therefore, as to where and how Congress derives a power outside the Constitution to alienate territory of the United States, ends in the simple assertion—made without genesis or supporting authority—that where sovereignty can not be alienated under the treaty-making power, it should be done by joint resolution.

Given the admitted fact that Congress lacks constitutional authority to alienate sovereignty, this casual assumption that it can nevertheless arrogate and exercise such power at will through the simple medium of a "joint resolution," can hardly be said, even by the most ardent disciples of the doctrine, to establish such extraconstitutional power "beyond any possible doubt or question." And yet, that is all there is—the whole basis upon which such alleged power in Congress is predicated; this notwithstanding it plays an inevitable havoc with the historical and universally accepted principle that our Government is one "of limited and enumerated powers," and that the Constitution "is the measure and the test of powers conferred."

JOINT RESOLUTION THEORY EMBODIES ITS OWN REFUTATION

The anomaly of this joint resolution importation is well illustrated in the text quoted. It results therefrom that if Porto Rico or the Philippines—and by inference any other Territory of the United States—should stage a successful revolt, and independence become a fait accompli, this situation would have to be recognized and met by treaty; that is, a formal instrument requiring for its validity favorable action by the President and two-thirds of the Senate. On the other hand, it is pretended that without any such revolt, and without the stress of necessity, national or international, Congress, by a mere majority vote, could placidly adopt a joint resolution and alienate such Territory or Territories whenever the spirit moved it. In other words, the treaty-making power can alienate territory only when forced to do so, whereas Congress can do so simply because it wants to.

Inasmuch as United States sovereignty over the Philippines is as incontestably vested as is that over California or other of our States, it would logically follow under this "joint resolution" doctrine that Congress could also alienate such State or States should the humour seize it. It is conceivable for instance, that if certain of our States should become dissatisfied with the treatment accorded them by the National Government, they might, through a successful lobby, procure this congressional "alienation" and set up for themselves. Had the Southern States followed this procedure in 1861 a long and bloody civil war might have been averted.

As it is further claimed by the proponents of this right in Congress to alienate Philippine sovereignty, that any such action, whether constitutional or not, would be a "political question," and hence beyond the jurisdiction of our courts to examine or control, it logically follows the same principle would apply should Congress, by joint resolution or otherwise, actually alienate sovereignty over a State or States. In other words, if conditions did not warrant or permit alienation of sovereignty under the treaty-making power, Congress could step in, ignore such conditions, effect such alientation through a device of its own invention, and then challenge our courts to void its action.

CLAIM ADVANCED BY JUSTICE MALCOLM

Justice Malcolm, in his Philippine Constitutional law, page 170, supports this extra-constitutional power to alienate sovereignty as follows:

> If sovereignty permits the United States to secure additional domain, conversely, the same correlative right of sovereignty must permit the United States to dispose of its territory. If the President can initiate a treaty to annex territory and the Senate can approve the treaty, obviously the President and the Senate can, by the same means, cede territory. The higher law of national expediency, benefits, or necessity must govern the dealings of one country with another. As the Supreme Court of the United States has said: "It certainly was intended to confer upon the Government the power of self-preservation." What other great nations have done, the United States can do.

Equally with the argument of Doctor Willoughby, the above is limited to a claim of what "the United States" can do in certain emergencies. It refers specifically to what the President and Senate can do under the treaty-making power; to the right of "self-preservation," and to the "higher law" which must govern "the dealings of one country with another."

Manifestly, as heretofore shown, this alleged power in "the United States," even if conceded, has no application to what Congress, a legislative body, can do where the proposed action is without constitutional sanction; is precluded under the treaty-making power; has nothing to do with "self-preservation," and has no relation whatsoever to "the dealings of one country with another."

Justice Malcolm further states, page 181:

> If other sovereign powers can recognize former portions of their territory as independent, because forced to do so, why can not the United States, as a power of equal rank, recognize the Philippines as a republic because she wishes to do so? And if Congress, or its agent, the President, shall recognize the Philippines to be a sovereignty, how long on such a political question would a litigant have standing in a court?

Here again the argument deals with what "the United States" can do, and this, apparently, without any limitation except "her wishes in the matter." Claim is lacking that Congress, as such, can lawfully alienate sovereignty, the only contention in this regard being that should Congress, or its agent, the President, recognize the Philippines as a sovereignty, our courts would be helpless to pass upon the constitutionality of the act. Even were this latter true, it is begging the question, which is, Can Congress, under our scheme of Government, lawfully alienate United States sovereignty? The proposition, however, is unsound. There is nothing in the decisions indicating that a proposed alienation of American territory by Congress—striking as it would at the foundations of our Nation and of

individual citizenship and property rights—would be treated simply as a "political question" and ignored by our courts. Moreover, any attempt by Congress to ride roughshod over the Constitution simply because it could not be brought to book therefor, would hardly recommend itself to right-thinking Americans. Such an attitude would be equivalent to arguing that if there was no policeman on the beat to prevent it, one could commit murder, robbery, or other lawless act without moral turpitude. It would reduce the measure of culpability to whether the particular violation of law could be put across with impunity.

Just how or where the American people empowered Congress to constitute the President "its agent" to alienate sovereignty, or the procedure to be followed in such event, is not specified. The further doctrine that the United States can alienate the Philippines because some Government body, clothed with brief authority, "wishes to do so," would, if given effect generally, relegate the Constitution to a museum specimen.

The disposition to endow Congress with practically omnipotent powers, and to acquiesce in measures by that body utterly unrelated to its legislative functions, is thus diagnosed by Mr. Justice Cooley in his Constitutional Limitations, seventh edition, page 124:

> It is natural we should incline to measure the power of the legislative department in America by the power of the like department in Great Britain; and to concede without reflection that whatever the legislature of the country from which we derive our laws can do, may also be done by the department created for the exercise of legislative authority in this country. But to guard against being misled by a comparison between the two, we must bear in mind the important distinction already pointed out, that with the Parliament rests practically the sovereignty of the country, so that it may exercise all the powers of the Government if it wills to do so; while on the other hand the legislatures of the American States are not the sovereign authority, and, though vested with the exercise of one branch of the sovereignty, they are nevertheless, in wielding it, hedged in on all sides by important limitations, some of which are imposed in express terms, and others by implications which are equally imperative.

How our system of government differs in this respect from those of European countries was clearly brought out by Chief Justice Jay in the early case of Chisholm *v.* Georgia (2 U. S. 419, 471), where it is aid:

> In Europe the sovereignty is generally ascribed to the prince; here it rests with the people; there, the sovereign actually administers the government, here, never in a single instance; our governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns. Their princes have personal powers, dignities, and preeminences; our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.

The same principle was thus stated by Justice McLean in Spooner *v.* McConnell (Fed. Cases, No. 13249):

> The sovereignty of a State does not reside in the persons who fill the different departments of government, but in the people from whom the government emanates and who may change it at their discretion. Sovereignty then, in this country, abides with the constituency and not with the agent, and this is true both in reference to the Federal and State Governments.

To the same effect Mr. Justice Day in Dorr *v.* United States (195 U. S. 138, 140)—a case arising in the Philippines—where it is said:

> It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Govern-

ment. The Government of the United States was born of the Constitution, and the powers which it enjoys or may exercise must be derived either expressly or by implication from that instrument.

Mr. Justice Cooley, in his Principles of Constitutional Law, pages 29, 31, thus states the relation of the Constitution to our scheme of government.

The Government created by the Constitution is one of limited and enumerated powers, and the Constitution is the measure and the test of the powers conferred. Whatever is not conferred is withheld, and belongs to the several States and the people thereof.

The Congress of the United States derives its power to legislate from the Constitution, which is the measure of its authority; and any enactment by Congress which is opposed to its provisions, or is not within the grant of powers made by it, is unconstitutional, and therefore no law, and obligatory upon no one.

The assumption that there are "extra-constitutional" powers or a "higher law" which can be invoked and exercised by Congress in its discretion, finds conclusive answer in Kansas *v.* Colorado (206 U. S. 46, 90), where our Supreme Court, speaking through Mr. Justice Brewer, said:

The proposition that there can be legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers.

The following from Story on the Constitution, volume 1, section 426, has direct application to arguments which seek to justify the exercise of extra-constitutional powers by Congress on the plea of "expediency, benefits, or necessity":

A rule of equal importance is not to enlarge the construction of a given power beyond the fair scope of its terms merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous the power of redressing the evil lies with the people by an exercise of the power of amendment. If they do not choose to apply the remedy, it may be fairly presumed that the mischief is less than what would arise from a further extension of the power, and that it is the least of two evils. Nor should it ever be lost sight of, that the Government of the United States is one of limited and enumerated powers, and that a departure from the true import and sense of its powers is pro tanto the establishment of a new Constitution. It is doing for the people what they have not chosen to do for themselves. It is usurping the functions of a legislator, and deserting those of an expounder of the law. Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare, ita lex scripta est, to follow, and to obey. Nor, if a principle so just and conclusive could be overlooked, could there well be a more unsafe ground in practice than mere policy and convenience. Men on such subjects complexionally differ from each other. The same men differ from themselves at different times. Temporary delusions, prejudices, excitements, and objects have irresistable influences in mere questions of policy. And the policy of one age may ill suit the wishes or policy of another. The Constitution is not to be subject to such fluctuations. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever.

The foregoing citations and quotations—which might be multiplied indefinitely—state the uniform and universal rule laid down by our courts, and any Government official, or combination of them, running counter thereto, does so in violation of his oath to uphold and defend the Constitution, and is recreant to his trust as an agent and representative of the American people.

DOCTRINE OF FORCE MAJEURE

The only exception to the rule—if it can be so termed—is in case of force majeure, i. e., stress of necessity, where the life of the nation is imperiled. An agent, unless specifically authorized, can not legally convey or give away the property of his principal. With a gun at his head, however, and his life at stake, he can do so without legal or moral responsibility. Applied specifically, our Government can, in case of a disastrous war, cede territory of the United States as the price of self-preservation. This power or right, however, can not be extended beyond the exigency of the particular case, nor made the basis for claiming a general authority to cede territory and expatriate United States citizens at will.

While this emergency has never arisen in the history of the United States, and no such territory has ever been ceded, it is obvious that when and if such emergency arises such cession will be had by and through the treaty-making power of the Government. There is nothing in the decisions indicating that in the absence of paramount necessity the President and two-thirds of the Senate could, of their own motion, alienate territory of the United States. Speaking upon this point our Supreme Court, in Downes *v.* Bidwell (182 U. S. 244, 317), stated:

> True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress. But the arising of these particular conditions can not justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of.

The fact, therefore, that territory can be alienated by treaty under stress of force majeure, furnishes no ground whatsoever for claiming that Congress can usurp this treaty-making function of the President and Senate, and itself alienate sovereignty by joint resolution or otherwise; this whether force majeure exists, or whether such action is undertaken simply to satisfy the party commitments, the personal viewpoint, or the political necessities of a majority of its members. The whole matter is outside its jurisdiction as a legislative body.

To the possible claim that the Philippine Islands are not an integral part of the United States, and can consequently be sloughed off at will, such argument ignores the fact that our inquiry has to do with alienation of sovereignty over territory, and not the measure of political rights enjoyed by or which may be accorded the occupants of such territory.

From standpoint of sovereignty, the Philippine Islands are just as much an integral part of the United States as is any other portion of our national commonwealth. Sovereignty is indivisible. Once completely and absolutely vested, as applies to the Philippines, it can not be split into classes or categories to satisfy the alleged needs of special interests nor to lend wings to the political kite of any partisan group.

In the case of Loughborough *v.* Blake (5 Wheat. U. S. 317), decided in 1820, Chief Justice Marshall, discussing the then status of the Missouri Territory, stated:

> The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania.

The "territory west of the Missouri," here referred to by this great constitutional authority, was not held in 1820 under firmer title or more complete sovereignty than is the territory of the Philippines, now functioning under a duly organized civil government by virtue of laws enacted by the Congress of the United States.

INTERPRETATION OF STATUTES

When question arises as to the construction of a particular statute, the intention of those responsible therefor, and the sense or meaning given it when enacted, are controlling in its interpretation.

If a statute is valid it is to have effect according to the purpose and intent of the lawmaker. The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. The intention of the legislature in enacting a law is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. (Sutherland, Statutory Construction, Vol. II, sec. 363.)

Opinions differ as to the present power of Congress to alienate sovereignty of the United States. A pronouncement on the question, therefore, by one of the framers of the Constitution, familiar with the proceedings which gave birth to that instrument, should not only carry great weight but should be conclusive in the absence of some express provision to the contrary.

Gov. Edmond Randolph, of Virginia, was a member of the convention which drafted the Federal Constitution, with opportunity to know the construction given it by himself and associates. Later, as a member of the Convention of Virginia, called to consider ratification of such Constitution, he spoke as follows in opposition to a proposed amendment which would have authorized three-fourths of the Members of both Houses of Congress "to cede the Territorial rights of the United States or any of them":

Of all the amendments, this is the most destructive, which requires the consent of three-fourths of both Houses to treaties ceding or restraining Territorial rights. * * * There is no power in the Constitution to cede any part of the United States. The whole number of Congress, being unanimous, have no power to suspend or cede Territorial rights. But this amendments admit in the fullest latitude, that Congress have a right to dismember the empire. (Debates and Other Proceedings of the Convention of Virginia, taken in shorthand by David Robertson, second edition, year 1805, p. 340.)

Recognition of a present power in Congress to alienate the Philippine Archipelago, and with it the analogous right to slice off other chunks of American territory, in its discretion, would, of necessity, result in the very catastrophe which Governor Randolph held could not be perpetrated under the Constitution—that is, "a right to dismember the empire."

As heretofore shown, if Congress can, of its own volition, alienate the Philippine Islands, where United States sovereignty and dominion "are completely and absolutely vested," then there is nothing in reason or principle to estop it from alienating sovereignty over other territory of the United States, and thus progressively dismember the Union. Certainly those early builders of our Nation, who so jealously guarded the rights and liberties of the American people against usurpation by their governmental agents, conferred no such authority and contemplated no such contingency.

PROPOSITION THAT RIGHT TO ACQUIRE AND ALIENATE TERRITORY ARE CORRELATIVE

A final ground upon which it is argued that alienation of United States sovereignty is presently authorized, is thus stated by Justice Malcolm, in Philippine Constitutional Law, page 170:

> If sovereignty permits the United States to secure additional domain, conversely, the same correlative right of sovereignty must permit the United States to dispose of its territory. If the President can initiate a treaty to annex territory and the Senate can approve the treaty, obviously the President and the Senate can, by the same, means cede territory.

Waiving the fact that this argument contemplates cession of territory under the treaty-making power and not by Congress, and that, as already seen, our Supreme Court limits the right to cede territory under the treaty-making power to the exigency created by a disastrous war, the proposition that because the United States can acquire territory it must have the correlative right to alienate territory, in nowise follows:

In Am. Insurance Co. *v.* Cantor (1 Peters (U. S.) 511, 540), Chief Justice Marshall thus stated the grounds upon which our Government is authorized to acquire territory:

> The Constitution confers absolutely on the Government of the Union the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The acquisition of territory, therefore, is a necessary "incident" of the powers granted by the Constitution to declare war and make treaties.

In Dred Scott *v.* Sandford (19 How. (U. S.) 393, 448), our Supreme Court, discussing the Louisiana purchase, stated:

> It (Louisiana purchase) was acquired by the General Government as the representative and trustee of the people of the United States and it must, therefore, be held in that character for their common and equal benefit; for it was the people of the several States, acting through their agent and representative, the Federal Government, who in fact acquired the territory in question, and the Government holds it for their common use until it shall be associated with the other States as a member of the Union.

Territory once acquired by the United States does not belong to the President, to Congress, or to the Government, but to the American people, who are the principal in the transaction, and who, as seen, have delegated no constitutional authority to their "agents and representatives" to alienate their sovereign rights therein.

Simply because an agent, whether it be a government or an attorney in fact, is authorized to adminster lands of the owner, and is given further latitude, under certain conditions, to acquire additional property at the expense and in the name of his principal, confers of itself no authority whatsoever upon such agent to sell or convey such holdings simply because acquired through his agency.

An agent can likewise deposit funds of his principal in a bank, but this fact, standing alone, confers no right upon him to check against and withdraw money from such account. If he undertakes to sell lands of his principal, or to cash checks in his name, specific authority so to do by the owner would be required before the transaction would be remotely considered.

It may also result that an unauthorized act will bind an alleged principal, this provided the latter acquiesces therein and appropriates the benefits. The fact, therefore, that Congress may, in any particular instance, have acquired territory on behalf of the American people without repudiation of the act by them, furnishes no ground for claiming that it (Congress) possesses a general power to acquire territory, much less the correlative right to alienate it thereafter.

The price usually paid for territory is the blood or treasure, or both, of the American people. Once sovereignty over such territory is completely vested, the only authority our Supreme Court recognizes in Congress with respect thereto is that of "organizing a territorial government therefor," of "making laws for the inhabitants," and eventually, in its discretion, of erecting such territory into a State of the Union. To arrogate more than this, under our form of government, is to play fast and loose with the fundamental rights of the American people.

A fact to be remembered is, that if Congress can alienate or relinquish sovereignty over the Philippine Islands under the guise of granting Philippine independence, it can equally sell or make a gratuitous transfer of such islands to Japan or like foreign power.

Further, our Supreme Court has held that in admininstering the Philippines, Congress lacks power to enact legislation which runs counter to any of the prohibitions of the Constitution; for instance, the passage of ex post facto laws, bills of attainder, or the depriving of persons of life, liberty, or property "without due process of law." (Dorr *v.* United States, 195 U. S. 138, 140; Balzac *v.* Porto Rico, 258 U. S. 298, 312.)

Acquiescence, however, in the alleged right of Congress to alienate the Philippine Islands, would, ipso facto, confer upon it the despotic power of divesting title and sovereignty of the American people over the entire archipelago, no less than the further unrestricted authority to transfer such territory, its peoples, lands, and government, to whomsoever it wills and upon terms of its own choosing. This would be omnipotence run riot.

POWER TO ALIENATE SOVEREIGNTY CAN BE CONFERRED BY AMENDMENT TO THE CONSTITUTION

Should time or shaping circumstances disclose, either as to the Philippines or any other territory of the United States, that it would be well to reverse the policy of the framers of the Constitution, and to vest in Congress this power to alienate United States territory in its discretion, it is within the province of the American people, in whom such sovereignty is vested, to confer such power through an amendment to the Constitution. As stated by our Supreme Court in Kansas *v.* Colorado (206 U. S. 46, 90):

> The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future; all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated.

Another opinion, contemporaneous with the founding of our Government, and equally pertinent in this connection, is that of Washington in his memorable Farewell Address. We quote therefrom as follows:

> It is important, likewise, that the habit of thinking in a free country should inspire caution in those intrusted with the administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transitory benefit, which the use can at any time yield.

CONCLUSION

The foregoing analysis of the claim that Congress is now empowered to alienate United States sovereignty over the Philippines, discloses that such pretention—

1. Is without constitutional sanction, express or implied.
2. Has no basis in reason, law, or necessity, the doctrine of "alienation of sovereignty by joint resolution" being a gratuitous importation into our governmental system.
3. Would violate the basic principles upon which our Government is founded.
4. Would be contrary to the intent of the Constitution as voiced by one of the responsible framers of that instrument.
5. Would be to usurp functions entirely outside the jurisdiction of Congress as a legislative body.
6. Would create the anomalous situation of permitting Congress to do of its own volition, and by majority vote, what the President and two-thirds of the Senate can not do under the treaty-making power except under stress of necessity.
7. Would, if carried to its logical conclusion, enable Congress "to dismember the empire."
8. Would render illusory the "sovereign rights" of the American people reserved to them by the Constitution, without which our Government becomes one of men and not of laws, with despotism in the offing.
9. Would be a betrayal of trust, and a violation of the oath taken by and obligation imposed upon Members of Congress to uphold and defend the Constitution.

Mr. Justice Cooley, in his Constitutional Limitations, page 109, lays down the following as a guide to legislators and others called to public office, where the constitutionality of any proposed action by them is doubtful:

> Whoever derives power from the Constitution to perform any public function is disloyal to that instrument, and grossly derelict in duty, if he does that which he is not reasonably satisfied the Constitution permits. Whether the power be legislative, executive, or judicial, there is manifest disregard of constitutional and moral obligation by one who, having taken oath to support that instrument, takes part in an action which he can not say he believes to be no violation of its

provisions. A doubt of the constitutionality of any proposed legislative enactment should in any case be reason sufficient for refusing to attempt it; and, if legislators do not act upon this principle, the reasons upon which are based the judicial decisions sustaining legislation in very many cases will cease to be of force.

It is submitted, therefore, both upon principle and authority, that an imperative condition precedent to the lawful granting of Philippine independence by Congress—whether based upon a present lack of power, or upon a well-founded doubt as to the constitutionality of the act—is the submission to and adoption by the American people of an amendment to the Constitution delegating the requisite power.

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